# Tamileswaaran a/l Ravi Kumar v Election Commission of Malaysia & Anor

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO WA-25–395–06 OF 2022
AMARJEET SINGH J
24 APRIL 2023

*Election — Election Commission ('EC') — Whether EC acted illegally/irrationally when it prohibited voter from entering polling station — Voter was officially listed as Covid-19 positive, 'high risk' and supposed to be undergoing home quarantine — Voter went to polling centre before expiry of quarantine period armed with self-test claiming he was Covid-19 negative — Whether although EC was sole authority in charge of conducting elections it was 'subject to the provisions of federal law' under art 113(1) of Federal Constitution ('the FC') — Whether federal law included Prevention and Control of Infectious Diseases Act 1988 ('the PACIDA') — Whether strict standard operating procedures ('SOPs') created by health authorities under PACIDA to contain spread of Covid-19 virus was binding on EC when it conducted elections — Whether voter's judicial review application to quash EC's decision denying him entry into polling centre had no merit — Whether voter could not claim compensatory damages for being denied of right to vote as that right was only a statutory one and not a fundamental right under Part II of FC*

On 12 March 2022, when the scourge of the Covid-19 virus pandemic was still rampant in Malaysia, elections were held in the State of Johore to elect members to the State Legislative Assembly amidst strict Covid-19 protocols and standard operating procedures ('SOPs'). The applicant, who was a registered voter for the Skudai state seat in Johore, tested positive for the Covid-19 virus on 7 March 2022 and was ordered to undergo home quarantine for seven days. However, on polling day, armed with a self-test result that allegedly showed that he was Covid-19 negative, the applicant went to his polling centre to cast his vote but was turned away by Election Commission ('EC') officers on the ground that, officially, he was still listed as Covid-19 positive and 'high risk' and was therefore not allowed to enter the polling centre in accordance with SOPs that were specially drawn up for the elections. The applicant filed the instant judicial review application to quash the EC's decision/action denying him entry into the polling centre to vote. He also sought a declaration that the EC had violated his constitutional right to vote under art 119 of the Federal Constitution ('the FC') and sought damages for that violation. The applicant argued that so long as he was eligible, under art 119 of the FC, to vote, the EC had no right to prevent him from doing so even if he had an infectious disease and was undergoing quarantine. The

applicant said the EC had acted ultra vires its powers when it allowed health authorities or the District Health Officer to dictate or determine whether or not he could enter the polling centre to vote as the EC was the sole authority charged with conducting elections and nothing in the election laws deprived an elector of his right to vote simply because he/she had an infectious disease. The applicant submitted that the SOPs created by the health authorities had no legal effect and could not override the EC's power to conduct elections to the extent of denying a voter of his right to vote. The applicant said the EC had acted illegally and irrationally by allowing the SOPs to prevail over art 119 of the FC. The EC's case was that so long as the applicant was required to undergo the seven-day quarantine and he was Covid-19 positive, the SOPs prohibited him from entering the polling centre to vote whether or not a self-test showed that he was negative.

**Held**, dismissing the judicial review application:

(1) The entitlement to vote was not untrammelled. The EC's power to conduct elections under art 113(1) of the FC was 'subject to the provisions of federal law'. This not only included election laws which had restrictions on the entitlement to vote but also included other laws relating to elections. The federal law in question here was the Prevention and Control of Infectious Diseases Act 1988 ('the PACIDA') which had a provision that conferred power on the Minister to make regulations to curb the outbreak of infectious diseases among humans that was threatening public health. The regulations made by the Minister empowered the Director-General of Health to make SOPs to regulate daily and specific activities in minute detail, control the movement of the public and enforce lockdowns and isolation of infected persons. Such SOPs — which had the force of law as they were made pursuant to PACIDA — were binding on the public, in particular on persons concerned with specific activities including the EC when it conducted elections as activities relating to elections involved the participation of the public in huge numbers (see paras 16, 25–26 & 31–33).

(2) After having declared (pursuant to the PACIDA) that all states in the country were 'infected local areas', the Minister promulgated the Prevention and Control of Infectious Diseases (Measures Within Infected Local Areas) (National Recovery Plan) Regulations 2021 ('the 2021 Regulations') which, among others, restricted the freedom of movement of all persons within any infected local area during the course of a designated phase. The Johore State Elections fell within Phase 4 of the National Recovery Plan. The 2021 Regulations and SOPs made specifically for the conduct of the Johore State Elections together clearly required persons who were Covid-19 positive to be in isolation or

quarantine for seven days and denied them entry to any place, including polling centres, for the purposes of carrying out the election process (see paras 35–39).

(3) Given that pursuant to art 113(1) of the FC, the EC's function to carry out the Johore State Elections was subject to the restrictions and limitations imposed by PACIDA, a federal law, the EC did not act illegally and/or irrationally when it complied with the SOPs to deny the applicant, who was then listed as Covid-19 positive, 'high risk' and undergoing quarantine, entry into the polling centre to vote (see paras 40 & 45).

(4) The applicant was not entitled to monetary compensation for being denied of his right to vote in the Johore State Elections. The right to vote was not a fundamental right enshrined in the fundamental liberties Chapter in Part II of the Federal Constitution. Although the right to vote was a cornerstone of democracy, it was a statutory right and not a civil or common law right. The right to vote was therefore subject to the limitations imposed by the statute conferring that right (see paras 46 & 49).

**[Bahasa Malaysia summary**

Pada 12 Mac 2022, ketika penularan wabak virus Covid-19 di Malaysia, pilihan raya telah diadakan di Negeri Johor untuk memilih ahli Dewan Undangan Negeri dengan prosedur operasi standard ('SOP') Covid-19 yang ketat. Beliau merupakan pengundi berdaftar bagi kerusi DUN Skudai di Johor dan disahkan positif virus Covid-19 pada 7 Mac 2022 dan diarahkan menjalani kuarantin di rumah selama tujuh hari. Bagaimanapun, pada hari pengundian, dengan keputusan ujian kendiri yang menunjukkan beliau negatif Covid-19, pemohon pergi ke pusat mengundi untuk membuang undi tetapi ditolak oleh pegawai Suruhanjaya Pilihan Raya ('SPR') atas alasan secara rasmi, beliau masih disenaraikan sebagai orang yang positif Covid-19 dan 'berisiko tinggi' dan oleh itu tidak dibenarkan masuk ke pusat mengundi menurut SOP pilihan raya. Pemohon memfailkan permohonan semakan kehakiman ini bagi membatalkan keputusan/tindakan SPR yang menafikan hak beliau untuk masuk ke pusat mengundi. Beliau juga memohon perisytiharan bahawa SPR telah melanggar hak perlembagaannya untuk mengundi di bawah perkara 119 Perlembagaan Persekutuan ('PP') dan menuntut ganti rugi atas pelanggaran tersebut. Pemohon berhujah bahawa selagi dia layak, di bawah perkara 119 PP, untuk mengundi, SPR tidak mempunyai hak untuk menghalangnya daripada berbuat demikian walaupun dia mempunyai penyakit berjangkit dan sedang menjalani kuarantin. Pemohon mengatakan bahawa SPR telah bertindak melampaui kuasanya apabila pihak berkuasa kesihatan atau Pegawai Kesihatan Daerah boleh menentukan sama ada beliau boleh memasuki pusat mengundi atau tidak untuk mengundi kerana SPR adalah pihak berkuasa tunggal yang menjalankan

pilihan raya dan tiada sebarang peruntukan di dalam undang-undang pilihan raya yang menghalang hak seorang pemilih untuk mengundi hanya kerana dia mempunyai penyakit berjangkit. Pemohon menghujahkan bahawa SOP yang diwujudkan oleh pihak berkuasa kesihatan tidak mempunyai kesan undang-undang dan tidak boleh mengatasi kuasa SPR untuk menjalankan pilihan raya sehingga menafikan hak pengundi untuk mengundi. Pemohon menghujahkan bahawa SPR telah bertindak secara tidak sah dan tidak rasional dengan membenarkan SOP melebihi peruntukan perkara 119 PP. Pembelaan SPR adalah selagi pemohon dikehendaki menjalani kuarantin selama tujuh hari dan beliau positif Covid-19, SOP beliau dilarang untuk memasuki pusat mengundi untuk mengundi menurut SOP yang disediakan sama ada ujian kendiri menunjukkan beliau negatif atau tidak.

**Diputuskan**, menolak permohonan semakan kehakiman:

(1) Kelayakan untuk mengundi tidak dinafikan. Kuasa SPR untuk menjalankan pilihan raya di bawah perkara 113(1) PP adalah 'tertakluk kepada peruntukan undang-undang persekutuan'. Ini bukan sahaja termasuk undang-undang pilihan raya yang mempunyai sekatan ke atas hak mengundi tetapi juga termasuk undang-undang lain yang berkaitan dengan pilihan raya. Undang-undang persekutuan yang dimaksudkan di sini ialah Akta Pencegahan dan Pengawalan Penyakit Berjangkit 1988 ('APPPB') yang mempunyai peruntukan yang memberikan kuasa kepada Menteri untuk membuat peraturan-peraturan bagi mengawal penularan penyakit berjangkit yang mengancam kesihatan awam. Peraturan-peraturan yang dibuat oleh Menteri memberi kuasa kepada Ketua Pengarah Kesihatan untuk membuat SOP bagi mengawal selia aktiviti harian dan khusus secara terperinci, mengawal pergerakan orang ramai dan menguatkuasakan sekatan pergerakan dan pengasingan orang yang dijangkiti. SOP sedemikian — yang mempunyai kuasa undang-undang seperti APPPB — mengikat orang ramai, khususnya kepada orang yang terlibat dengan aktiviti tertentu termasuk SPR ketika menjalankan proses pilihan raya kerana aktiviti berkaitan pilihan raya melibatkan penyertaan orang ramai dalam jumlah yang besar (lihat perenggan 16, 25–26 & 31–33).

(2) Selepas diisytiharkan (menurut APPPB) bahawa semua negeri di negara ini 'kawasan tempatan jangkitan', Menteri telah mengisytiharkan Peraturan-Peraturan Pencegahan dan Pengawalan Penyakit Berjangkit (Langkah-Langkah Di Dalam Kawasan Tempatan Jangkitan) (Pelan Pemulihan Negara) 2021 ('Peraturan-Peraturan 2021') yang, antara lain, menyekat kebebasan pergerakan orang dalam mana-mana kawasan tempatan jangkitan menurut fasa yang ditetapkan. Pilihan Raya Negeri (PRN) Johor jatuh di dalam Fasa 4 Pelan Pemulihan Negara. Peraturan-Peraturan dan SOP 2021 yang dibuat khusus bagi menjalankan Pilihan Raya Negeri ('PRN') Johor jelas mewajibkan

individu yang positif Covid-19 berada dalam pengasingan atau kuarantin selama tujuh hari dan ianya menafikan hak mereka masuk ke mana-mana tempat termasuk pusat mengundi, bagi tujuan menjalankan proses pilihan raya (lihat perenggan 35–39).

(3) Menurut perkara 113(1) PP, fungsi SPR untuk menjalankan Pilihan Raya Negeri Johor adalah tertakluk kepada sekatan yang dikenakan oleh APPPB, undang-undang persekutuan, SPR tidak bertindak secara salah dan/atau tidak rasional apabila mematuhi SOP untuk menafikan hak pemohon yang disenaraikan sebagai positif Covid-19, 'berisiko tinggi' dan sedang menjalani kuarantin untuk masuk ke pusat mengundi untuk mengundi (lihat perenggan 40 & 45).

(4) Pemohon tidak berhak mendapat pampasan wang kerana dinafikan haknya untuk mengundi di dalam Pilihan Raya Negeri ('PRN') Johor. Hak untuk mengundi bukanlah hak asasi yang termaktub di dalam Bab Kebebasan Asasi di dalam Bahagian II Perlembagaan Persekutuan. Walaupun hak untuk mengundi merupakan asas demokrasi, ianya adalah hak berkanun dan bukannya hak undang-undang sivil atau umum. Oleh itu, hak untuk mengundi adalah tertakluk kepada batasan yang dikenakan oleh undang-undang yang memberikan hak tersebut (lihat perenggan 46 & 49).]

**Cases referred to**

*Alam Venture Sdn Bhd & Anor v Abdul Aziz bin Abdul Majid & Ors* [2015] 4 MLJ 270; [2015] 5 CLJ 1, FC (refd)

*Anukul Chandra Pradhan v Union of India* [1997] SC 2814, SC (refd)

*Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, intervener)* [2004] 2 MLJ 257; [2004] 1 CLJ 701, FC (refd)

*Election Commission, Malaysia v Abdul Fatah bin Haji Haron* [1987] 2 MLJ 716, SC (refd)

*Jyoti Basu and others v Debi Ghosal* [1982] 1 SCC 691, SC (refd)

*Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh* [1997] 1 MLJ 789; [1997] 2 CLJ 11, SC (refd)

*Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor* [2021] 1 MLJ 750; [2021] 2 CLJ 579, FC (refd)

*Petroliam Nasional Bhd v Nik Ramli Nik Hassan* [2004] 2 MLJ 288; [2003] 4 CLJ 625, FC (refd)

*R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145, FC (refd)

*Saman Gulam v Tan Sri Haji Mohd Sunoh Marso & Ors* [1987] 2 MLJ 718, SC (refd)

*Yazid bin Sufaat & Ors v Suruhanjaya Pilihanraya Malaysia* [2009] 6 MLJ 152; [2010] 3 CLJ 903, FC (refd)

*ZI Publications Sdn Bhd & Anor v Kerajaan Negeri Selangor (Kerajaan Malaysia & Anor, intervener)* [2016] 1 MLJ 153; [2015] 8 CLJ 621, FC (refd)

**Legislation referred to**

Election Offences Act 1954
Elections (Conduct of Elections) Regulations 1981 regs 15(6)(b), 23
Elections (Postal Voting) Regulations 2003
Elections (Registration of Electors) Regulations 2002
Elections Act 1958
Federal Constitution arts 5(1), 8(1), 113(1), 118, 119, 119(1), (3), 160(2), Part II,
Prevention and Control of Infectious Diseases (Measures Within Infected Local Areas) (National Recovery Plan) Regulations 2021 regs 5, 5(1), 16
Prevention and Control of Infectious Diseases (Declaration of Infected Local Areas) (Extension of Operation) (No 3) Order 2021
Prevention and Control of Infectious Diseases (Declaration of Infected Local Areas) Order 2020
Prevention and Control of Infectious Diseases Act 1988 s 11, 11(1), First Schedule, Part I

*New Si Yew (with Nur Izni Syazwani) (AmerBON) for the applicant.*
*Mohammad Al-Saifi Hj Hashim (with Raja Shahril Anuar Raja Baniamin and Nor Aqilah Abdul Halim) (Attorney General's Chambers) for the respondent.*

**Amarjeet Singh J:**

INTRODUCTION

**[1]** On 7 December 2022, I dismissed the applicant, Tamileswaaran a/l Ravi Kumar's application for the following reliefs:

(a) an order of certiorari to quash the decision or action of preventing and/or denying the applicant of his right to vote on 12 March 2022;

(b) a declaration that the first respondent, the Election Commission of Malaysia ('the Election Commission') had wrongfully prevented or denied the applicant of his right to vote on 12 March 2022 on the ground that the applicant was in a quarantine period;

(c) a declaration that the Election Commission was wrong under the law in preventing or denying the applicant of his right to vote on the ground that the applicant had contracted an infectious disease;

(d) a declaration that the Election Commission had violated the applicant's constitutional right under art 119 of the Federal Constitution; and

(e) damages for the violation of the applicant's constitutional right.

**[2]** This judgment contains the full reasons for my decision.

A BACKGROUND FACTS

**[3]** The applicant is a registered elector for the Skudai constituency that is represented in the Johor State Legislative Assembly. The State of Johore held its elections for the State Legislative Assembly and the polling day was scheduled B on 12 March 2022 ('polling day'). The applicant's polling station was at the polling centre known as Sekolah Kebangsaan Taman Tun Aminah 2 ('the polling centre'). The elections took place at the time when the country was still grappling with the Covid-19 pandemic. Standard operating procedures had been put in place by the Director-General of Health which provided detailed C procedures and protocols to be followed for the Johore State Elections as a measure to curb and manage the spread of Covid-19.

**[4]** On 7 March 2022 the applicant was tested and found to be positive for D Covid-19 positive. He was ordered to undergo home quarantine or isolation under the Standard Operating Procedure ('SOP') of Phase 4 of the National Recovery Plan. Isolation was mandatory under this SOP for persons found to have been infected with the Covid-19 virus. On 12 March 2022, while in his sixth day of isolation the applicant claimed to have self-tested himself at his E home and found the result showing negative for Covid-19.

**[5]** Armed with the self-test result the attended his polling centre against the mandatory requirement of the said SOP and when his MySejahtera status showed that he was positive for Covid-19. MySejahtera is an application F developed by the Government of Malaysia to assist in curbing and managing the Covid-19 outbreak in the country. It has many features including the current Covid-19 status of a person. The applicant was turned away from the polling centre by virtue of the 'Prosedur Operasi Standard ('SOP') Pencegahan G Covid-19 Bagi Pelaksanaan Pilihan Raya Umum (PRU) Dewan Negeri Johor Ke-15' ('SOP for the Johore State Elections') according to the election officers on duty at the polling station. It was said that persons positive for Covid-19 were not allowed in the polling centre.

H **[6]** It is not in dispute that the applicant's MySejahtera status showed that he was 'high risk' due to being positive for Covid-19. Only persons who were negative for Covid-19 and without any symptoms in relation to Covid-19 were allowed into the polling centre and to their respective polling stations to vote. The other categories of persons allowed into the polling centre but to a specially I constructed tent in the polling centre to vote are: (i) persons negative for Covid-19 on their MySejahtera but showing symptoms for Covid-19; and (ii) persons known as 'patients under investigation ('PUI') or 'persons under surveillance' ('PUS') who have a written permission from the District Health Officer.

**[7]** The applicant claimed to have tried to contact the Johor Bahru District Health Department via telephone in order to obtain written permission but was not able to reach anyone. This was due to the fact that the District Health Department was closed for the weekend. It is obvious that what the applicant was attempting to do as advised by health officer manning the specially constructed tent would have been an exercise in futility since the applicant status is positive for Covid-19 and he is someone who is not a PUS or a PUI. This would be against the clear protocol in the SOP for the Johore State Elections which states that a person positive for Covid-19 cannot be allowed into the polling centre. As a result, the applicant was unable to exercise his right to vote for the candidate of his choice for the said elections.

**[8]** On 8 June 2022, the applicant applied for leave to commence judicial review proceedings for an order of certiorari to quash the decision and/or action denying him entry into the polling centre to cast his vote and for declarations to the effect that he was denied his constitutional right to vote.

GROUNDS FOR REVIEW

**[9]** The applicant advanced two established grounds of review to support the reliefs he was seeking. The first was that the decision or action refusing him entry into the polling centre and to cast his vote was tainted with *illegality* for the following reasons:

(a) the applicant has a right to vote under art 119 of the Federal Constitution, Elections Act 1958 and Elections (Conduct of Elections) Regulations 1981 ('election laws') and since the applicant has fulfilled the requirements under the election laws the Election Commission cannot prevent him from voting;

(b) the elections laws do not empower the Election Commission to deny the applicant admission into the polling centre and prevent him from exercising his constitutional right to vote on the grounds that he had contracted an infectious disease (which is denied) and was still in his quarantine period;

(c) the election laws do not provide any requirement for voters within their quarantine period to obtain prior permission from the District Health Officer before they can exercise their rights to vote. The Election Commission had imposed a condition on the applicant's right to vote which is not provided for by election laws;

(d) the Election Commission acted beyond the powers under the election laws by preventing the applicant from voting;

(e) the Election Commission had wrongfully delegated its powers to the District Health Officer in the matter of whether the applicant is allowed to vote; and

(f) the Election Commission failed to exercise its duties and/or discretion correctly under the election laws to allow the applicant to vote.

**[10]** The second ground advanced was that the decision or action of the Election Commission refusing him entry to cast his vote was an irrational or unreasonable act for the following reasons:

(a) the applicant was prevented from voting notwithstanding the applicant's Covid-19 self-test result was negative;

(b) although the Election Commission had prepared health officers with PPE and designated polling tent for voters with Covid-19 symptoms, PUI and PUS, the applicant was prevented from voting because he was still under quarantine and had not obtain the written permission from the District Health Office;

(c) the Election Commission was inconsistent in its decision and/or action as it had allowed persons who were Covid-19 positive and/or within the quarantine period to vote at other polling centres on the same day;

(d) the Election Commission failed to take into account the applicant's legitimate expectation as a citizen to vote; and

(e) the Election Commission's decision and/or action was so perverse and unjustifiable that no reasonable tribunal would have done the same.

RELEVANT PRINCIPLES OF JUDICIAL REVIEW

**[11]** The applicant in his written submissions submitted that his case is centred on the grounds of *illegality* and/or *irrationality* of the Election Commission's decision and/or action in preventing the applicant from voting. It suffices to state that both grounds permit the court to review the decision or action complained not only for process but also substance (see *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145). However, post *R Rama Chandran* cases have clarified the application of the principle therein where it is said that for reasons of public policy, national interest, *public safety* or national security it maybe wholly inappropriate for the courts to attempt any substitution of views (see *Petroliam Nasional Bhd v Nik Ramli Nik Hassan* [2004] 2 MLJ 288; [2003] 4 CLJ 625 *Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh* [1997] 1 MLJ 789; [1997] 2 CLJ 11 and *Alam Venture Sdn Bhd & Anor v Abdul Aziz bin Abdul Majid & Ors* [2015] 4 MLJ 270; [2015] 5 CLJ 1).

**[12]** In *Kumpulan Perangsang Selangor Bhd*, Gopal Sri Ram JCA (as he then was) delivering the judgment of the Supreme Court lucidly stated the principle in the following words:

> ... there may be cases in which, *for reasons of public policy, national interest, public safety or national security, it may be wholly inappropriate for the courts to attempt any substitution of views*. Unlike the Executive, *the Judiciary is not armed with all the information relevant to such matters and one could well understand a High Court, in the exercise of its discretionary power, declining to enter into the merits of a decision involving these considerations.* Each case must be considered on its own facts and it would be quite unwise to attempt the formulation of an all-embracing rule. (Emphasis added.)

ELECTION COMMISSION'S CASE

**[13]** On behalf of the Election Commission, its election officer in charge of the polling centre, Abdul Hamid bin Ismail confirmed in an affidavit in reply affirmed on 28 July 2022 that the applicant had come to the specially constructed tent in the afternoon of polling day. The MySejahtera status of the applicant showed 'high risk' or positive for Covid-19. The applicant had asked that he be allowed to vote since his self-test showed a negative result.

**[14]** Abdul Hamid bin Ismail averred that the health officer on duty at the tent, Corneilia Mila ak Billie informed the applicant to obtain a letter from the District Health Officer allowing a PUI or a PUS persons to be allowed into the polling centre if he still intended to vote. Corneilia Mila ak Billie in an affidavit in reply affirmed on 28 July 2022 averred the same facts.

**[15]** One Dr Mohd Anwar bin Shahrir who was the officer from the District Health Department and in charge of such specially constructed tents in ten polling centres for the said elections said as follows in his affidavit in reply affirmed on 28 July 2022:

> Saya sesungguhnya menafikan perenggan 16 Afidavit Sokongan Pemohon dan sesungguhnya menyatakan bahawa tiada arahan baru yang dikeluarkan oleh Suruhanjaya Pilihan Raya (SPR) pada hari pilihan raya iaitu 12 March 2022. Pemohon sememangnya tidak dibenarkan untuk mengundi kerana SOP yang dirujuk di Ekshibit MAS-1 di muka surat 19 telah dengan jelas menyatakan bahawa Pengundi berstatus Covid-19 Positif adalah TIDAK DIBENARKAN keluar dari tern pat mereka sedang menerima rawatan (hospital/pusat kuarantin/rumah dll) untuk mengundi kerana sememangnya masih berjangkit dan boleh menyebabkan penularan jangkitan kepada orang lain selagi mana masih dalam rawatan. *Saya juga menegaskan bahawa ujian kendiri yang dibuat oleh mana-mana individu termasuklah Pemohon tidak akan mengubah status dalam MySejahtera mereka* kecuali mereka mendapatkan pengesahan daripada pihak Kementerian Kesihatan Malaysia. *Tempoh kuarantin atau isolasi sekurang-kurangnya selama 7 hari bagi kes positif Covid-19 adalah dikekalkan ketika itu sepertimana dinyatakan dalam SOP Fasa 4,*

*Pelan Pemulihan Negara (PPN) kemaskini 7 March 2022*. (Emphasis added.)

**[16]** All three deponents had referred to the SOP for the Johore State Elections. I have no hesitation in holding that the act of excluding the applicant from the polling centre was a decision susceptible to judicial review and that the decision was based on the SOPs which had legislative effect. The standing operating procedures have force of law because they are made pursuant to subsidiary legislation promulgated to curb the outbreak of a dangerous infectious disease under the Prevention and Control of Infectious Diseases Act 1988 ('the PACIDA') ie Covid-19.

**[17]** The applicant was turned away from the polling centre based on the SOP for the Johore State Elections which provided the following procedures or protocol for attendance control at every premise that is used for election purposes (this would include the polling centre) for the duration of the election:

> Kehadiran di setiap premis yang digunakan bagi tujuan pelaksanaan pilihan raya adalah tertakluk kepada Arahan Tetap yang berkuatkuasa yang mana tidak menjejaskan pelaksanaan proses pilihan raya.
>
> Kod QR MySejahtera/Buku Pendaftaran Kehadiran (nama, nombor telefon dan masa) WAJIB disediakan di setiap premis yang digunakan bagi tujuan pilihan raya. *Setiap individu yang hadir ke premis-premis ini hendaklah mengimbas Kod QR MySejahtera serta mengemaskini status kesihatan dalam aplikasi MySejahtera atau mencatat kehadiran di dalam buku yang disediakan (nama, nombor telefon dan masa).*
>
> Menempatkan petugas untuk menyemak status risiko dan gejala bagi setiap individu yang hadir ke premis tersebut. *Hanya individu berstatus 'Low risk' atau 'Casual contact' sahaja dibenarkan masuk.*
>
> *Individu positif COVID-19 TIDAK DIBENARKAN hadir ke mana-mana premis yang digunakan untuk aktiviti berkaitan pilihan raya.* (Emphasis added.)

**[18]** Dr Mohd Anwar bin Shahrir also referred to the protocol concerning electors who were Covid-19 positive on polling day which said as follows:

> *Bagi pengundi yang berstatus COVID-19 positif, mereka adalah TIDAK DIBENARKAN keluar dari tempat mereka sedang menerima rawatan (hospital/pusat rawatan/pusat kuarantin/rumah dll) untuk mengundi kerana masih dalam rawatan dan sememangnya masih berjangkit dan boleh menyebabkan penularan jangkitan kepada orang lain selagi mana masih dalam rawatan.*

**[19]** It is the Election Commission's case that based on the SOP for the Johore State Elections and the SOP for Phase 4 of the National Recovery Plan electors who are 'high risk' or positive Covid-19 by virtue of their MySejahtera status are to be in isolation and cannot leave their quarantine places. The SOP which was updated on 7 March 2022 required persons positive for Covid-19

persons who had been completely vaccinated or received their 'booster dose' to be isolated for 7 days whether or not they have Covid-19 symptoms. Further, the SOP for the Johore State Election expressly provided that persons positive for Covid-19 were barred from entering any premises used for any activity relating to elections which would include the polling centre.

ANALYSIS AND DECISION

**[20]** The applicant by his application is mainly testing the applicability of the SOP for Phase 4 of the National Recovery Plan and the SOP for the Johore State Elections vis a vis his constitutional right to vote under art 119(1) of the Federal Constitution and if he is successful seeks constitutional compensatory damages for the deprivation of such right in the form of exemplary damages relying on *Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor* [2021] 1 MLJ 750; [2021] 2 CLJ 579.

**[21]** For brevity and convenience, a reference in this judgment to an article is a reference to that article in the Federal Constitution.

**[22]** At the outset it is important to list out the laws relating to elections before addressing the complaints of the applicant. The Election Commission is established under art 113(1) and under this provision is bestowed with two functions. The first is to conduct elections to the House of Representatives and the Legislative Assemblies of the States and the second is to prepare and revise electoral rolls for such elections (see *Election Commission, Malaysia v Abdul Fatah bin Haji Haron* [1987] 2 MLJ 716, *Saman Gulam v Tan Sri Haji Mohd Sunoh Marso & Ors* [1987] 2 MLJ 718).

**[23]** These two functions are elaborated in the Elections Act 1958 and amplified in minute detail in the following regulations made thereunder: (i) Elections (Conduct of Elections) Regulations 1981 ('the 1981 Regulations'); (ii) Elections (Registration of Electors) Regulations 2002; and (iii) Elections (Postal Voting) Regulations 2003. Certain other matters concerning the conduct of elections are provided under the Election Offences Act 1954 which also provides for electoral offences and election petitions.

*Whether there was unlawful deprivation of the right to vote*

**[24]** It was submitted that the decision denying the applicant admission to his polling station on the ground that he had contracted an infectious disease and thereby depriving him of his entitlement to vote is unlawful and has contravened art 119(1). It was argued that an elector is disqualified from voting only in the two instances provided under art 119(3) and under any law relating to offences committed in connection with elections. It was further argued that

the applicant was not so disqualified as stipulated and that there was nothing whatsoever in the election laws that deprived an elector to vote on the basis that such elector was infected with an infectious disease. It was also argued that the sole power to hold elections was conferred on the Election Commission and that the SOP for the Johore State Elections has no legal effect insofar as it pertains to the conduct of elections. In this regard it was argued that the Election Commission had acted ultra vires and/or irrationally by relying on the said SOP by putting it above art 119(3).

**[25]** I am unable to agree with this submission. Under art 119(1) it is clear that an elector who fulfils the requirements of age and residency and who is registered as an elector in the electoral roll of the constituency in which he resides is entitled to vote in any election unless he is disqualified under art 119(3) or under any law relating to offences committed in connection with elections. But more importantly, it cannot be overlooked that the Election Commission is also subject to federal law when conducting elections by virtue of art 113(1). In my judgment one such federal law is the PACIDA. The PACIDA has a provision that confer power to the Minister to make regulations to curb the outbreak of infectious diseases among humans that is threating public health.

**[26]** Covid-19 began as a pandemic and an incontrovertible threat to humans causing fatalities in the thousands in Malaysia and millions throughout the world. Countries affected by Covid-19 also closed their borders and took similar action as was taken in Malaysia to control of movement of its citizens. The regulations made by the Minister empower the Director-General of Health to make standing operating procedures to regulate daily and specific activities, in minute detail, which control of movement of the public including serious measures as lock-downs and isolation of infected persons. Such standing operating procedures bind the public, in particular the persons concerned in a specific activity which in my mind would obviously include the Election Commission when conducting elections as activities relating to elections involve the participation of the public in huge numbers.

**[27]** My reasons for being unable to agree with the submission is as follows. I begin with art 119 which provides:

> (1) Every citizen who —
>
> (a) has attained the age of eighteen years on the qualifying date;
>
> (b) is resident in a constituency on such qualifying date or, if not so resident, is an absent voter; and
>
> (c) is, under the provisions of any law relating to elections, registered in the electoral roll as an elector in the constituency in which he resides on the

qualifying date,

is entitled to vote in that constituency in any election to the House of Representatives or the Legislative Assembly unless he is disqualified under Clause (3) or under any law relating to offences committed in connection with elections; but no person shall in the same election vote in more than one constituency.

(2) If a person is in a constituency by reason only of being a patient in an establishment maintained wholly or mainly for the reception and treatment of persons suffering from mental illness or mental defectiveness or of being detained in custody he shall for the purposes of Clause (1) be deemed not to be resident in that constituency.

(3) A person is disqualified for being an elector in any election to the House of Representatives or the Legislative Assembly if —

(a) on the qualifying date he is detained as a person of unsound mind or is serving a sentence of imprisonment; or

(b) having before the qualifying date been convicted in any part of the Commonwealth of an offence and sentenced to death or imprisonment for a term exceeding twelve months, he remains liable on the qualifying date to suffer any punishment for that offence.

(4) In this Article —

(a) 'absent voter' means, in relation to any constituency, any citizen who is registered as an absent voter in respect of that constituency;

(b) 'qualifying date' means the date on which a person is registered as an elector in a constituency, or the date on which he applies for the change of his registration as an elector in a different constituency, in accordance with the provisions of any law relating to elections.

**[28]** Article 119 provides for three main matters. First, the qualifications to be an elector and the instances an elector is disqualified from being registered as an elector ie when he applies for the first time to be an elector or when an elector who is already registered as an elector applies for the change of his registration as an elector in a different constituency. Second, where a citizen is successfully registered as an elector on the electoral roll of the constituency in which he resides in that person is entitled to vote in any elections held in respect of the constituency. Thirdly, an elector would be disqualified from voting in any election notwithstanding he is a registered elector if he is:

(a) detained as a person of unsound mind;

(b) is serving a sentence of imprisonment;

(c) sentenced to death or imprisoned for a term exceeding 12 months in any part of the Commonwealth; and

(d) is disqualified under any law relating to offences committed in connection with elections.

**[29]** As shown above, it was submitted that outside the four said situations the entitlement to vote is untrammelled. In my view, the submission is result of a very restrictive and isolated interpretation of art 119(1) without considering the other articles concerning the conduct of elections. It is an established and frequently applied principle of constitutional construction that no provision of the Constitution should be considered in isolation. The particular provision under scrutiny must be brought into view with all the other provisions bearing on the same subject so that the true interpretation can be made (see *ZI Publications Sdn Bhd & Anor v Kerajaan Negeri Selangor (Kerajaan Malaysia & Anor, intervener)* [2016] 1 MLJ 153; [2015] 8 CLJ 621 and *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, intervener)* [2004] 2 MLJ 257; [2004] 1 CLJ 701).

**[30]** The connected article that throws light on the conduct of elections is art 113(1) which provide as follows:

> There shall be an Election Commission, to be constituted in accordance with article 114, which, *subject to the provisions of federal law, shall conduct elections to the House of Representatives and the Legislative Assemblies of the States* and prepare and revise electoral rolls for such elections. (Emphasis added.)

**[31]** The words 'subject to the provisions of federal law' in art 113(1) are words indicating restriction. The words warn that there would be in a federal law somewhere a limitation upon the authority to conduct elections. The words 'federal law' in art 160(2), amongst others, mean an Act of Parliament. Thus, there could be an Act of Parliament which would impose restrictions or limitations on the Election Commission in their function of conducting elections.

**[32]** The entitlement to vote is therefore not untrammelled. The 'federal law' in art 113(1) would first and foremost include election laws such as the Elections Act 1958 and the regulations made thereunder which have restrictions on the entitlement to vote. Take for instance the 1981 Regulations, made under the Elections Act 1958, which contain provisions that impose restrictions on the entitlement to vote. It suffices to refer to a couple of these provisions. Regulation 15(6)(b) restrict admittance into his polling station an elector who either misconducts himself or fails to obey a lawful order given by the presiding officer of the polling station and reg 23 deprives an elector from voting in cases where the elector arrives at the polling station after the hour fixed for the closing for poll.

**[33]** Secondly, the words 'federal law' would also include laws other than

laws relating to elections. The federal law in question here is the PACIDA. Before proceeding it is pertinent to briefly put again into context the infectious disease known as Covid-19 in relation to the PACIDA. This court can take judicial notice of the fact that the world was faced with a pandemic caused by a virus which until then was unknown and highly infectious causing fatalities through transmission amongst humans. There was no precedent to assist in controlling or preventing the spread of the virus. In Malaysia, laws were promulgated and restrictions were put in place from time to time ranging from initially total lock-downs to various degrees of restriction on movements imposed on the public under the PACIDA and the regulations made thereunder including the various SOPs issued from time to time on all daily and specific activities of the public. As alluded to above, one of the many specific activities for which the SOPs were promulgated was the Johore State Elections. At this point in time the SOP for Phase 4 of the National Recovery Plan updated on 7 March 2022 was also in force.

**[34]** Now, PACIDA is a public health legislation enacted to prevent and control infectious diseases whether the infectious disease is within or outside Malaysia. In situations where there is an outbreak of an infectious disease in the country s 11 of the PACIDA is triggered as was done in this case giving it authority over all persons in the country and coercive powers in cases of non-compliance. The section read as follows:

> (1) If the Minister is satisfied that there is an outbreak of an infectious disease in any area in Malaysia, or that any area is threatened with an epidemic of any infectious disease, he may, by order in the Gazette, declare such area to be an infected local area.
>
> (2) The Minister may, by regulations made under this Act, prescribe the measures to be taken to control or prevent the spread of any infectious disease within or from an infected local area.
>
> (3) During the continuance in force of an order made under subsection (1), it shall be lawful for any authorized officer to direct any person or class or category of persons living in an infected local area or in any part thereof to subject himself or themselves —
>
> (a) to treatment or immunization;
>
> (b) to isolation, observation or surveillance, the period of which being specified according to circumstances; or
>
> (c) to any other measures as the authorized officer considers necessary to control the disease.
>
> (4) It shall be lawful for an authorized officer to use such force, with or without assistance, as may be necessary and to employ such methods as may be sufficient to ensure compliance with any direction issued under subsection (3).

(5) Any person who refuses to comply with any direction issued under subsection (3) commits an offence.

**[35]** The Minister in the exercise of his powers under sub-s 11(1) of the PACIDA made the Prevention and Control of Infectious Diseases (Declaration of Infected Local Areas) Order 2020 vide PU(A) 87/2020 with effect from 18 March 2020 after being satisfied that all the States and Federal Territories in Malaysia were under the threat with an epidemic of an infectious disease known as Covid-19, which is a life threatening microbial infection as specified in Part I of the First Schedule to the Act, and declared all the States and the Federal Territories to be infected local areas. The operation of this order was extended from time to time and was in force during the Johore State Elections. The said order was in operation from 1 January 2022 until 30 June 2022 by virtue of the Prevention and Control of Infectious Diseases (Declaration of Infected Local Areas) (Extension of Operation) (No 3) Order 2021 vide PU(A) 472/2021.

**[36]** Having declared all the states in the country as an infected local area the Minister promulgated the Prevention and Control of Infectious Diseases (Measures Within Infected Local Areas) (National Recovery Plan) Regulations 2021 (PU(A) 293/2021) ('the 2021 Regulations'). Regulation 5 of the 2021 Regulations restricted the freedom of movement of all persons within any infected local area during the course of a designated phase in the following words:

(1) No person shall, during *any designated phase, move from one place to another place within any infected local area, …*

(2) *Notwithstanding sub regulation (1), the Director General may issue any directions and conditions for the purposes of movement of any person, during any designated phase, from one place to another place within any infected local area, …*

(3) Any directions and conditions issued by the Director General under sub regulation (2) shall be published in the website of the National Security Council. (Emphasis added.)

**[37]** The phrase 'designated phase' in reg 5(1) of the 2021 Regulations is defined in the said regulations as 'any phase in the National Recovery Plan determined and announced by the Government from time to time and published in the website of the National Security Council. The Johore State Elections fell within the scope of the SOP for Phase 4 of the National Recovery Plan.

**[38]** The SOP for Phase 4 of the National Recovery Plan and the SOP for the Johore State Elections were made by the Director-General of Health pursuant

to reg 16 of the 2021 Regulations which state:

> (1) The Director General may, during any designated phase, issue any directions and conditions in any manner, whether generally or specifically, to any person or group of persons to take such measures for the purpose of preventing and controlling any infectious diseases within any infected local area.
>
> (2) Any directions and conditions issued by the Director General under sub-regulation (1) shall be published in the website of the National Security Council.

**[39]** The 2021 Regulations and the SOPs made thereunder would bind the public generally while the SOP for the Johore State Elections would specifically bind the Election Commission in its function of conducting elections. The period the SOP is in force is for the entire duration of the election process. On polling day there would be mass movement and close gathering of the electors at the various polling centres and polling stations. The legislation was promulgated for the public health and imposed restrictions and limitations to prevent and control the transmission of the virus amongst electors, election officers and other officers who are on duty. The SOP for Phase 4 of the National Recovery Plan was very clear in restricting persons positive with Covid-19 to be in isolation or quarantine for seven days while the SOP for the Johore State Elections denied entry of such persons to any place for the purposes of carrying out the election process which would include polling centres.

**[40]** In view of the above backdrop, in particular art 113(1) which expressly provides that the Election Commission's function to carry out elections would be subject to 'federal law' which in the instant case is the PACIDA, a law enacted to prevent and control infectious diseases for public health. The election was therefore subjected to the restrictions and limitations imposed under such federal law. I have no hesitation in holding that the Election Commission had not acted *illegally* and/or *irrationally* by complying with and giving effect to the SOP for the Johore State Elections by restricting admittance into the polling centre electors positive for Covid-19. The Election Commission was bound by art 113(1) to give effect to such federal law when carrying out its function of conducting elections.

*Persons positive for Covid-19 not restricted from voting*

**[41]** The applicant's alternative submission was that, even if, the Election Commission was correct in relying on the SOP, the SOP itself does not prevent the applicant from voting. It was argued that all that the SOP does is prohibit voters who are Covid-19 positive, PUS and PUI from leaving their quarantine place to go to the polling centre without approval from the District Health Officer. But given that the applicant was already at his polling centre (obviously

by violating the SOP), there is nothing in the SOP to stop him from voting. It was argued that it is not the business of the Election Commission to enforce the breach of the SOP as that function is that of the Director-General of Health. It was also argued that the SOP provides that electors positive for Covid-19 are allowed to vote by virtue of this protocol which provides for disinfection in the following words:

> Khemah/bilik/ruang khas hendaklah dilakukan disinfeksi berdasarkan garis panduan KKM sebaik sahaja selepas setiap pengundi positif COVID-19, PUI dan PUS selesai mengundi.

**[42]** At first blush it would appear that electors positive for Covid-19 were entitled to vote together with electors who were PUS or PUI. However, having considered the entire SOP carefully, I found that the SOP prevented electors positive for Covid-19 from entering any premises used for the conduct of elections. In my view by merely looking at one paragraph in isolation of the other paragraphs does not convey the true meaning of the SOP. In considering all the relevant paragraphs in totality I found as follows. The first part of the SOP concerns the control of attendance or 'kawalan kehadiran' at all premises used for election purposes. The SOP state as follows (numbering inserted for convenience):

> (i) Kehadiran di setiap premis yang digunakan bagi tujuan pelaksanaan pilihan raya adalah tertakluk kepada Arahan Tetap yang berkuatkuasa yang mana tidak menjejaskan pelaksanaan proses pilihan raya.
>
> (ii) Kod QR MySejahtera/Buku Pendaftaran Kehadiran (nama, nombor telefon dan masa) WAJIB disediakan di setiap premis yang digunakan bagi tujuan pilihan raya. Setiap individu yang hadir ke premis-premis ini hendaklah mengimbas Kod QR MySejahtera serta mengemaskini status kesihatan dalam aplikasi MySejahtera atau mencatat kehadiran di dalam buku yang disediakan (nama, nombor telefon dan masa).
>
> (iii) *Menempatkan petugas untuk menyemak status risiko dan gejala bagi setiap individu yang hadir ke premis tersebut Hanya individu berstatus 'Low risk' atau 'Casual contact' sahaja dibenarkan masuk.*
>
> (iv) *Individu positif COVID-19 TIDAK DIBENARKAN hadir ke mana-mana premis yang digunakan untuk aktiviti berkaitan pilihan raya.* (Emphasis added.)

**[43]** It is clear that any persons positive for Covid-19 are prevented from admittance to any premises used for any activity concerning the elections. Then there is a whole section of the SOP assigned to deal with electors having symptoms of Covid-19 which is not necessary to reproduce here. Finally, there are the procedure and protocol concerning electors who are positive for Covid-19 and electors who are either PUS or PUI on polling day stated as follows (numbering inserted for convenience):

(i) Bagi pengundi yang berstatus COVID-19 positif, mereka adalah TIDAK DIBENARKAN keluar dari tempat mereka sedang menerima rawatan (hospital/pusat rawatan/pusat kuarantin/rumah dll) untuk mengundi kerana masih dalam rawatan dan sememangnya masih berjangkit dan boleh menyebabkan penularan jangkitan kepada orang lain selagi mana masih dalam rawatan.

(ii) Pengundi berstatus patient under investigation (PUI) dan person under surveillance (PUS) yang ingin mengundi HENDAKLAH MEMOHON KEBENARAN dari Pegawai Kesihatan Daerah (PKD), Pejabat Kesihatan Daerah yang mengawasi Arahan Perintah Pengawasan dan Pemerhatian berkenaan, untuk keluar sementara ke Pusat Mengundi. Kebenaran ini adalah tertakluk kepada penilaian risiko jangkitan oleh Pegawai Kesihatan Daerah tersebut dan pengundi perlu mematuhi semua garis panduan yang ditetapkan oleh KKM.

(iii) Pengundi yang berstatus PUI dan PUS hendaklah diasing dan DITEMPATKAN DI KHEMAH/BILIK/RUANG KHAS yang disediakan.

(iv) PUI dan PUS DIKEHENDAKI menggunakan pengangkutan sendiri untuk pergi ke Pusat Mengundi. Penggunaan pengangkutan awam TIDAK DIBENARKAN.

(v) Kebenaran keluar mengundi untuk individu yang berstatus PUI dan PUS adalah tertakluk kepada tempoh yang dibenarkan oleh pihak KKM. Setelah selesai mengundi, individu ini dikehendaki segera meninggalkan Pusat Mengundi dan terus pulang ke tempat kuarantin dijalankan.

(vi) Khemah/bilik/ruang khas hendaklah dilakukan disinfeksi berdasarkan garis panduan KKM sebaik sahaja selepas setiap pengundi positif COVID-19, PUI dan PUS selesai mengundi.

**[44]** The SOP states that persons positive for Covid-19 are barred from leaving the place of their quarantine. The applicant is not 'low risk' or 'casual contact', 'PUS' or 'PUI'. He is positive for Covid-19 on polling day although he claims that his self-test was negative. This court is not in a position to determine whether the SOP for Phase 4 of the National Recovery Plan which requires seven days isolation is irrational or not because issues of public health are for the executive to decide. It is wholly inappropriate for this court to attempt any substitution of views. In matters of public health, especially, concerning an until then an unknown infectious disease this court declines in the exercise of its discretionary power to enter into the merits of such a decision.

**[45]** For all the above reasons, I hold that there was no *illegality* or *irrationality* for the Election Commission to comply with the said SOP. The Election Commission did not commit any error of law or misconstrue the SOP for the Johore State Elections. The Election Commission was under art 113(1)

A subject to any federal law which concerns public health in carrying out its function of conducting elections. The SOP which is made under the PACIDA has legislative effect and was lawfully followed by the Election Commission.

*Damages*

B

**[46]** The applicant submitted that he is entitled to constitutional monetary compensation from the Election Commission for depriving him of his constitutional right to vote provided in art 119(1). He relies on the principle propounded in the minority judgments of the Federal Court in *Maria Chin Abdullah*. In the circumstances the principle was not binding on this court. However, since the matter was extensively ventilated it is my decision that the claim for constitutional monetary compensation expounded in the minority judgments have no application in respect of a deprivation of the entitlement to vote under art 119(1). My reasons are as follows.

C

D

**[47]** The minority judgments explained that although the claim for constitutional monetary compensation is not expressly stated in the Federal Constitution it is nevertheless grounded on the breach of the fundamental rights chapter of the Federal Constitution itself in the following words:

E

> [600] The point to be made is this. Where a breach of a fundamental right is alleged, a cause of action lies. The right itself is grounded on the FC and it does not strictly matter whether the breach could also be made out under private law remedies. The rule is stated with caution as it is not absolute and it depends on the circumstances of the case ...
>
> F
>
> [601] ... to what extent 'constitutional monetary compensation' is available depends on the facts and circumstances of each case and that the remedy should only be afforded with great judicial restraint ... such awards, that is, of constitutional monetary compensation, should only be made 'in appropriate cases where that is the only mode of redress available' ... that constitutional monetary compensation is essentially exemplary damages (though again, not damages in the sense of O 53 r 5 of the ROC 2012). ...

G

**[48]** In *Maria Chin Abdullah* the fundamental right that was violated was the right of personal liberty under art 5(1) read with art 8(1). The minority judgments were of the view that the declarations granted to the effect that the decision to blacklist Maria Chin Abdullah from travelling overseas in the circumstances was a breach of the said articles and therefore unconstitutional and void. The minority judgments, after considering the facts of the case held that the circumstances do not justify the grant of constitutional monetary compensation and the declarations already granted meet the ends of justice. Thus, a monetary compensation is not always necessary as a declaration that there was a breach of fundamental right would in appropriate circumstances vindicate the fundamental right of a person.

H

I

**[49]** It is clear that the case of *Maria Chin Abdullah* concerned a fundamental right enshrined in the fundamental liberties chapter housed in Part II of the Federal Constitution. This chapter contains the fundamental inalienable freedoms or basic human freedoms. The right to vote is not part of this fundamental liberties chapter This is not so strange, although the right to vote is a cornerstone of democracy, given that the right to vote is a statutory right and not a civil right or common law right. The position was stated by the Federal Court in *Yazid bin Sufaat & Ors v Suruhanjaya Pilihanraya Malaysia* [2009] 6 MLJ 152; [2010] 3 CLJ 903 following the Supreme Court of India decision in *Anukul Chandra Pradhan v Union of India* [1997] SC 2814 which said:

> It may also be mentioned that the nature of right to vote has been held to be a statutory right and not a common law right because of which it depends on the nature of right conferred by the statute. In *NP Ponnuswami v Returning Officer, Namakkal Constituency* [1952] SCR 218 at p 236, the Constitution Bench held:
>
> > The right to vote or stand as a candidate for election is not a civil right but is a creature of statute or special law and must be subject to the limitations imposed by it.

In *Jyoti Basu and others v Debi Ghosal,* [1982] 1 SCC 691 at p 696, the law on the point was restated, thus:

> The nature of the right to elect, the right to be elected and the right to dispute an election and the scheme of the constitutional and statutory provisions in relation to these rights have been explained by the court in *NP Ponnuswami v Returning Officer, Namakkal Constituency,* [1952] SCR 218 and *Jagan Nath v Jaswant Singh,* [1954] SCR 892. We proceed to state what we have gleaned from what has been said, so much as necessary for this case.
>
> A right to elect, fundamental though it is to democracy, is, anomalously enough, neither a fundamental right nor a common law right. It is pure and simple, a statutory right. So is the right to dispute an election. Outside of statute, there is no right to elect, creations they are, and therefore, subject to statutory limitation'
>
> In view of the settled law on the point, it must be held that the right to vote is subject to the limitations imposed by the statute which can be exercised only in the manner provided by the statute; and that the challenge to any provision in the statute prescribing the nature of right to elect cannot be made with reference to a fundamental right in the Constitution. The very basis of challenge to the validity of sub-s of s 62 of the Act is, therefore, not available and this petition must fail.

**[50]** Secondly, the remedy provided for breach of any provision relating to conduct of elections is by way of an election petition as provided by art 118. The remedy is elaborated in the Election Offences Act 1954. The denial of a right to vote is a breach of the right of a person registered on the electoral roll. The right is to elect a representative who is standing for elections together with

thousands of other electors. The right to vote is therefore not part of the jurisdiction that deals with the rights and obligations of individuals as in the ordinary civil jurisdiction of the court because such jurisdiction is unknown to the courts. The right to vote is part of the process which includes the right to stand for elections as a candidate and the right to question the result of the election. The right to vote does not exist in vacuum. It is part of a special jurisdiction that deals with matters affecting on the one hand the integrity of the country's legislature and on the other hand the representation in that legislature of constituencies comprising many thousands of electors. This jurisdiction provides only one remedy which is an election petition.

CONCLUSION

**[51]** For the reasons stated above I dismissed the application for judicial review.

*Application for judicial review dismissed.*

Reported by Ashok Kumar